LEIGHTON CONTRACTORS (M) SDN BHD v. GNANAPRAGASAM ARUKIAM & ORS

HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[CIVIL APPEAL NO: 16-10-12-2015]
9 AUGUST 2016

LABOUR LAW: *Employment – Overtime payment – Claimants paid for eight hours but made to work for nine hours – Claim for overtime payment – Clause in letter of appointment stating that monthly salary inclusive of payment of any additional hours worked with no additional payment for overtime – Whether claimants contractually-bound by clause – Whether nature of claimants' work regarded as manual labour – Claimants earning more than statutory threshold – Whether claimants fall under statutory purview and protection – Whether claimants entitled to claim for overtime – Employment Act 1955, ss. 60A(3) & 69*

The respondents were employed by the appellant as shunter/train assistants for the construction of the Northern Double Track Ipoh to Padang Besar project. The respondents lodged a complaint to the Director General of Labour that despite working for nine hours, they were paid for only eight hours. They claimed for overtime payment under s. 60A(3) of the Employment Act 1955 ('the Act'). According to the respondents, their colleague ('the colleague'), who was also employed as a shunter/train assistant, was paid overtime. In refuting the respondents' claim, the appellant relied on cl. 4 of the respondents' letter of appointment which stipulated that their monthly salary was inclusive of payment of any additional hours worked and no additional payment would be made overtime. The appellant contended that (i) the respondents were contractually-bound by these terms; (ii) since the respondents' monthly salaries, inclusive of fixed monthly allowances at the commencement of their employment, was RM2,500 (in excess of RM2,000), they did not fall under the ambit of the Act and therefore, were not entitled to claim for overtime under s. 60A(3) of the Act; and (iii) the payment made to the colleague was done by mistake. Alternatively, the appellant submitted that as the nature of the respondents' work did not entail that they were engaged in manual labour or if they were employed partly in manual labour and partly in some other capacity, the time during which they were required to perform manual labour in any one wage period did not exceed one-half of the total time during which they were required to work in such wage period, they did not fall under the First Schedule of the Act and therefore out of its coverage. The respondents, on the other hand, argued that as they were classified as manual labourers under the First Schedule of the Act, although their monthly salaries exceeded RM2,000, they were entitled to overtime claims under the said Act. The Director General of Labour held that the respondents were employees within the definition of the First Schedule of the Act and were therefore entitled to

a claim of overtime pursuant to s. 60A(3) and brought under s. 69 of the Act in the aggregate sum of RM41,717.90 together with penalty for late payment and interests. Hence, the present appeal. The pivotal issue that arose for the court's adjudication was whether the respondents were employees within the definition of the First Schedule of the Act, thus entitling them to overtime claims.

Held (dismissing appeal with costs):

(1) The respondents were earning more than the statutory threshold of RM2,000 per month. Therefore, *prima facie*, they did not fall under the purview and protection of the Act unless they could bring themselves within sub-s. 2(1) of the First Schedule *ie*, that they were engaged in manual labour or fell within the deeming proviso to the said sub-section. (para 11)

(2) Although there was no evidence of their job description in order to describe their duties as shunter/train assistants, from the evidence adduced at the labour court, the nature of work performed included displaying signals to the train drivers, train marshalling, separating the train coaches and reducing the number of coaches known as shunting movement, vacuum pipe with bare hands, pulling lever and tumber point, fixing vacuum pack and connecting the coaches, assembling coach or arranging coach lots, operating level point, attaching and dissecting vacuum poch, checking all brakes and releasing brakes, detaching and re-attaching coaches, round the engine from front to the back, loading and unloading ballast and following the train from Sungai Petani to Padang Besar or from Bukit Mertajam to Padang Besar. The respondents were also required to work for ten hours per day with a one hour break which meant that they were working for nine hours per day but were paid for only eight hours work. There was also evidence that the time taken for each task varied, with shunting movements by itself taking about one to one and a half hours with the frequency ranging from four to five times per day. (paras 14-16)

(3) The act of sitting in the train while awaiting it to arrive at its destination could not be construed as a deliberate act of idleness but was rather that of being put on standby while awaiting further instructions which constituted part of their work function. Although any manner of work that was incidental or temporal in nature was clearly to be excluded from such consideration, the nature of the work performed must be viewed as a whole and not in isolated segments or compartments. The necessity of the respondents in exercising their judgment when indicating the signals to move or stop to the train assistant, or the fact that they would need to communicate with the train driver during shunting movements did not take the work performed out of the scope of 'being engaged in manual labour'. No form of work could be

altogether taken to be mindless. Even an iron smith must exercise some reasonable skill and exercise of judgment in the forging of articles of iron. No one would readily dispute that he is engaged in manual labour. (paras 20-22)

(4) A consideration of the duties of the respondents, when viewed as a whole, made it quite clear that the general nature of their employment was physical in nature. The respondents did not perform any desk jobs nor were any tables or offices assigned to them. They did not perform any work using paper, pen or stationary and neither did their work involve the use of computers. (para 17)

(5) The contention that the colleague was paid overtime by mistake was only raised during the trial. There was no evidence of any action taken to recover the sum. This amounted to a mere afterthought on the part of the appellant. (para 26)

Case(s) referred to:
Colgate Palmolive Sdn Bhd v. Cheong Foo Weng [2001] 1 LNS 394 HC ***(refd)***

Legislation referred to:
Employment Act 1955, ss. 2, 60A(3), 69, First Schedule s. 2(1)

For the appellant - Navit Kaur Randhawa & Zarith Satina Md Sani; M/s Asbir Hira Singh & Co
For the respondents - Palaniappan M Ramasamy; M/s Palani

Reported by Najib Tamby

JUDGMENT

Collin Lawrence Sequerah JC:

Introduction

[1] This is an appeal by the appellant against the decision of the Director General of Labour given on 26 November 2015 which held that the abovenamed respondents were employees within the definition of First Schedule of the Employment Act 1955 (Act 265) ("Act") and therefore entitled to a claim of overtime pursuant to s. 60A(3) and brought under s. 69 of the Act in the aggregate sum of RM41,717.90 together with penalty for late payment and interests.

Brief Facts And Contentions Of Parties

[2] The three respondents were employed by the appellant as "shunter/train assistant" for the construction of the Northern Double Track Ipoh to Padang Besar project.

[3] The respondents lodged a complaint to the Director General of Labour that all three of them were paid for 8 hours work but made to work for 9 hours. Their claim was for overtime payment under s. 60A(3) of the Employment Act 1955. They also submitted that a colleague of theirs, namely Peraisamy a/l Apavoo who was also employed as a "shunter/train assistant" was paid overtime.

[4] The appellant in response relied upon cl. 4 of the respondents' letters of appointment which read as follows:

> WORKING HOURS
>
> Working hours are from 8.00a.m to 6.00p.m, Monday to Saturday with a one (1) hour lunch break. Normal working hours shall be as per requirements at the respective sites and may vary depending on the Project's operational requirements. The Company reserves the right to change the schedule of working hours according to Project requirements and the employee shall be informed accordingly.
>
> You will be expected to work additional hours as and when necessary to facilitate the performance of your duties. **Your monthly salary is inclusive of payment of any additional hours worked and no additional payment will be made for overtime.** (emphasis added)

[5] The appellant therefore contends that the respondents are contractually bound by these terms. The appellant also submitted that as the monthly salaries of the respondents inclusive of fixed monthly allowances at the commencement of their employment was RM2,500 each (in excess of RM2,000), they do not fall under the ambit of the Act and therefore are not entitled to claim for overtime under s. 60A(3) of the Act.

[6] Alternatively, the appellant submits that as the nature of the respondents work do not entail that they are engaged in manual labour or if they are employed partly in manual labour and partly in some other capacity, the time during which they are required to perform manual labour in any one wage period does not exceed one-half of the total time during which they are required to work in such wage period, they do not fall under the First Schedule of the Act and therefore out of its coverage.

[7] The appellant further submitted that the payment made to the said Peraisamy a/l Apavoo was done by mistake.

[8] The respondents on the other hand contended that as they are classified as manual labourers under the First Schedule of the Act, although their monthly salaries exceed RM2,000, they are entitled to overtime claims under the said Act.

Findings And Decision

[9] The pivotal issue in this appeal is whether the respondents are employees within the definition of the First Schedule of the Employment Act 1955, thus entitling them to overtime claims.

[10] In the Employment Act 1955, s. 2 defines "employee" as follows:

> means any person or class of persons:
>
> (a) **included in any category in the First Schedule to the extent specified therein**; or
>
> (b) in respect of whom the Minister makes an order under subsection(3) or section 2a;

The categories of persons in the First Schedule who qualify as "employees" are as follows:

> First Schedule
>
> [Subsection 2(1)]
>
> 2. Any person who, **irrespective of the amount of wages he earns in a month**, has entered into a contract of service with an employer in pursuance of which:
>
> (1) he is **engaged in manual labour** including such labour as an artisan or apprentice:
>
> *Provided that where a person is employed by one employer partly in manual labour and partly in some other capacity such person shall not be deemed to be performing manual labour unless the time during which he is required to perform manual labour in any one wage period exceeds one-half of the total time during which he is required to work in such wage period*; (emphasis added)

[11] It is not in dispute that the respondents were all earning more than the statutory threshold of RM2,000 per month. Therefore, *prima facie* they do not fall under the purview and protection of the Employment Act 1955 unless they can bring themselves within sub-s. 2(1) of the First Schedule ie, that they are engaged in manual labour or fall within the deeming proviso to the said sub-section.

[12] On the particular facts of the case therefore, the question is whether, the respondents are "engaged in manual labour" or are employed partly in manual labour or partly in some other capacity "performing manual labour where the time during which they are required to perform such manual labour in any one wage period exceeds one-half of the total time during which they are required to work in such wage period", in which case they will be deemed to be engaged in manual labour. If they are successful in proving this, then they are rightfully entitled to their claim of overtime payments under s. 60A(3) of the said Act.

[13] In *Colgate Palmolive Sdn Bhd v. Cheong Foo Weng* [2001] 1 LNS 394; [2002] 2 AMR 2107, the meaning of the term "manual labour" was defined as follows:

> "Manual labour" involves physical exertion as opposed to mental/intellectual effort. Thus it is not manual labour if "the real labour involved is labour of the brain and intelligence". Whilst all manual labour would entail some manual work, it cannot be readily assumed that the person performing the manual work is a manual labourer and further it cannot also be accepted that the person is in law "engaged in manual labour". *The test to determine whether or not a person is "engaged in manual labour" is: "what is the substantial/dominant purpose of the employment, to the exclusion of the matters which are incidental or accessory to the employment"*. It is therefore essential to determine whether the work in question is purely physical in nature, as opposed to work which has a physical/manual content but which is really dependent upon acquired skill, knowledge or experience. (emphasis added)

[14] Although there was no evidence of their job description in order to describe their duties as shunter/train assistants, from the evidence adduced at the labour court, the nature of work performed included displaying signals (flags) to the train drivers, train marshalling, separating the train coaches and reducing the number of coaches known as shunting movement, vacuum pipe with bare hands, pulling lever and tumber point, fixing vacuum pack and connecting the coaches, assembling coach or arranging coach lots, operating level point, attaching and dissecting vacuum poch, checking all brakes and releasing brakes, detaching and reattaching coaches, round the engine from front to the back, loading and unloading ballast and following the train from Sungai Petani to Padang Besar or from Bukit Mertajam to Padang Besar.

[15] The respondents were also required to work for 10 hours per day with a one hour break which meant that they were working for 9 hours per day but were paid for only 8 hours work, hence their claim for overtime payment.

[16] There was also evidence that the time taken for each task varies, with shunting movements by itself taking about one to one and a half hours with the frequency ranging from four to five times per day.

[17] A consideration of the duties of the respondents as enumerated above, when viewed as a whole, makes it quite clear that the general nature of their employment is physical in nature. The respondents do not perform any desk jobs nor were any tables or offices assigned to them. They do not perform any work using paper, pen or stationary and neither does their work involves the use of computers.

[18] The policy behind the said phrase "engaged in manual labour", as stated in the *Colgate Palmolive* case *(supra)*, is to protect employees who are engaged in purely physical work devoid of mental application for more than half (50%) of the entire wage period but earn a salary in excess of RM2,000. It was also held in that decision that the definition ought to exclude such manual work that was considered incidental or temporal in nature.

[19] While this may be so, it is not to be taken to mean that segments of the work performed can be viewed and considered in isolation in determining whether the work amounts to "being engaged in manual labour". This was exactly what the appellant was attempting to do when they submitted that the time taken for certain portions of the respondents' duties, for example, giving signals to the train drivers would only take about five minutes and that the time spent "following the train" while awaiting arrival cannot be considered as time spent being "engaged in manual labour".

[20] I agree with the submission of learned counsel for the respondents that the act of sitting in the train while awaiting it to arrive at its destination cannot be construed as a deliberate act of idleness but was rather that of being put on standby while awaiting further instructions which constituted part of their work function.

[21] According to the definition in the *Colgate Palmolive* case, although any manner of work that is incidental or temporal in nature was clearly to be excluded from such consideration, the nature of the work performed must be viewed as a whole and not in isolated segments or compartments.

[22] The necessity of the respondents in exercising their judgment when indicating the signals to move or stop to the train assistant, or the fact that they would need to communicate with the train driver during shunting movements does not take the work performed out of the scope of "being engaged in manual labour". No form of work can be altogether taken to be mindless. Even an iron smith must exercise some reasonable skill and exercise of judgment in the forging of articles of iron. No one would readily dispute that he is engaged in manual labour.

[23] Notwithstanding that the respondents had to exercise some judgment when indicating the signals to move or stop to the train assistant, or the fact that they were required to communicate with the train driver during shunting movements, the substantial or dominant purpose of their work was spent engaged in manual work, a large portion of which involved shunting movements (where coaches were detached, rearranged, reduced and reattached) which took about one to one and a half hours with the frequency ranging from four to five times per day.

[24] Such work cannot be reasonably classified as anything other than manual labour. No paperwork was involved and neither did such work require any exercise of an intellectual nature. It was purely mechanical and physical in nature.

[25] The contradictions between the witnesses for the appellant in respect of the exact scope of the respondent work did not further the appellant's cause. While SD2 testified that shunters were not involved in manual labour, SD1 said that shunters were involved in shunting movement which involves separating, rearranging or reducing the number of coaches.

[26] With respect to the contention of the appellant that one other person who was involved in "shuntering", namely, Periasamy a/l A Appavoo was paid overtime by mistake, I agree with the respondents that as this was only raised during the trial and there was no evidence of any action taken to recover the sum, that it amounted to a mere afterthought on the part of the appellant.

[27] The findings of the Director General of Labour involved findings of fact in the main. It is trite that these findings of fact ought not to be lightly disturbed. I see no good reason for so doing here. I therefore dismissed this appeal with costs.